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EXEMPTION OF PRIVATE PROPERTY AT SEA FROM CAPTURE.

Among the wishes recorded in the *Acte Final* of the Peace Conference, which assembled at The Hague in 1899, are the following: that the question of the rights and the duties of neutrals be entered on the programme of a near future conference; that the proposal which contemplates the declaration of the inviolability of private property in war upon the sea be referred (*renvoyée*) to a subsequent conference for examination; and that the proposal to settle the question of the bombardment of open towns by naval forces be referred to a subsequent conference for examination. Although these wishes found no contractual obligation on the part of the signatories of the several Hague conventions, the three subjects thus remitted are well entitled to privileged consideration in formulating the programme of the second conference whose call at an early date seems now to be assured. Events of the recent war have so sufficiently shown the need of general agreement on many questions of the rights and the duties of neutrals (so fully and ably set forth by Professor Holland in his paper read before the British Academy in April last) as to leave less doubt of their consideration, than of the broad principle of the inviolability of private property at sea.

As early as May 7, 1784, the United States resolved in favor of this principle. In instructions of this date to the American commissioners in Paris, the Congress, enjoying the full treaty-making power of the Confederation, authorized the insertion in the treaties to be concluded with the

states of Europe, a provision declaring that, in case of war between the contracting parties, all merchants and traders exchanging products, and thereby rendering the necessaries, conveniencies, and comforts of human life more easy to obtain and more general, should "be allowed to pass free and unmolested," and that neither party should issue commissions to private armed vessels empowering them to take such trading ships or interrupt such commerce.[1] Such was one of the liberal principles upon which the Congress proposed to establish a general system of European treaties. Negotiations were opened at Paris with the representatives of nearly every power of Europe, but with Prussia alone were they brought to a successful conclusion. In article XXIII of the treaty concluded with this power in 1785 was inserted, with few verbal changes, the instructions to the American commissioners on the immunity of private property at sea.

The declaration by the French government in 1823 of its intention not to molest, in the otherwise ominous war with Spain, the commerce either of Spain or of neutrals, except in case of an attempt to break a blockade, afforded the United States a favorable opportunity of again bringing the subject to the attention of European powers. It was doubtless with a peculiar interest that John Quincy Adams, Secretary of State, recollective of the instructions under which as minister to Prussia he had negotiated the treaty of 1799, now inserted in the *projet* of a treaty, which should serve as a basis of the negotiations, the provisions of article XXIII of the first treaty with Prussia. Richard Rush, our minister at London, was the first to be instructed. Said the Secretary of State in instructions of July 28, 1823: "We make the first proposal to Great Britain as to the power most competent to secure its ultimate success, and to the nation which we sincerely believe would finally derive the greatest share of the blessing which its universal establishment would bestow upon the family of man."[2] Questions of commerce, fisheries, boundaries, slave-trade, general maritime law and impressment of seamen, and the greater problem of future policy as to the new American

[1] Secret Journals, III., 486.

[2] American State Papers, Foreign Relations, V, 533.

republics, likewise demanded the attention of the able American minister. Early in his negotiations, he had declared an unwillingness to enter into any agreement with regard to maritime questions, except in conjunction with a stipulation on the question of impressment,—a question which the British plenipotentiaries pointedly refused to reopen. When, then, an attempt was made to introduce as a separate proposition the subject of exemption of private property at sea from capture, the reply was made that, under the circumstances which had prevented a discussion of the question of maritime law, there would be manifest inconvenience in going into a question of the same class, which, besides being totally new as an object of discussion, involved a most extensive change in the principles and practice of maritime war.[1] The inextricable connection of questions of maritime law and of impressment thus prevented a consideration of the American proposal. "But it is proper for me to remark," said Mr. Rush, in reporting, on August 12, 1824, the result to the Secretary of State, "that no sentiment dropped from the British plenipotentiaries authorizing the belief that they would have concurred in the object if we had proceeded to the consideration of it. My own opinion, unequivocally, is that Great Britain is not prepared to accede, under any circumstances, to the proposition for abolishing private war upon the ocean."[2] Both the Russian and French governments, to whom the proposal was likewise communicated expressed their hearty approval of the principle, but urged the expediency of its universal adoption.

At the outbreak of the Crimean War, it was feared by the Allies that Americans might accept commissions from the Emperor of Russia to cruize as privateers. Propositions were made to the United States to enter into engagements for the abolition of privateering. In reporting, on March 24, 1854, a conversation with Lord Clarendon on the subject, Mr. Buchanan, minister at London, said: "In answer, I admitted that the practice of privateering was subject to great abuses; but it did not seem to me possible, under existing circumstances, for the United States to agree to its suppression, unless the great naval powers would go

[1] American State Papers, Foreign Relations, V. 564. [2] Id. V, 551.

one step further, and consent that war against private property should be abolished altogether upon the ocean as it had already been upon the land."[1] President Pierce, in his annual message of December following, declared that the United States could entertain no proposition to enter into engagements by which private property would be exempt from capture by her volunteer fleet and yet remain liable to seizure by national ships of war; but he added, "Should the leading powers of Europe concur in proposing as a rule of international law to exempt private property upon the ocean from seizure by public armed cruisers as well as by privateers, the United States will readily meet them upon that broad ground."[2] In 1856 came the famous Declaration of Paris, with its four rules on maritime law inseparably joined. They are (1) That privateering is and remains abolished; (2) That the neutral flag covers an enemy's goods, with the exception of contraband of war; (3) That neutral goods, with the exception of contraband of war, are not liable to capture under the enemy's flag; and (4) That blockades to be binding must be effective. Consistently with the policy clearly announced in his annual message a year and a half earlier, President Pierce, through his Secretary of State, Mr. Marcy, refused to accept the rule abolishing privateering until an amendment had been made for the exemption of private property from capture by public armed vessels. Mr. Mason, minister at Paris, was immediately instructed to propose to the French government an arrangement to this end.[3] Negotiations were instituted by France with the other signatories. Russia, Prussia, Italy and the smaller states of Europe, with general unanimity, expressed their approval, and gave assurances of support should the proposed amendment become the subject of a collective deliberation. Said Prince Gortschakoff, in instructions to the Russian minister at Paris: "By order of the Emperor you are invited to entertain this idea before the minister of foreign affairs, and to apprise him forthwith that should the American proposition become the subject

[1] House Ex. Doc. No. 103, p. 10, 33rd Cong., 1st Sess.

[2] Messages, V, 275.

[3] Mr. Marcy to the Count de Sartiges, July 28, 1856; Mr. Marcy to Mr. Mason, July 29, 1856.

of common deliberation among the powers, it would receive a most decided support at the hands of the representative of His Imperial Majesty. You are even authorized to declare that our august master would be disposed to take the initiative of this question." The Russian minister at London was likewise fully informed of the Emperor's decided approval of the measure. In reporting to the Department of State, March 18, 1857, Mr. Mason observed, "I have no doubt that the delay in consummation of the proposed modification of the Declaration of the Congress of Paris, proceeds from hesitation on the part of England to give that consent without which the French government does not feel at liberty to enter into an arrangement, modifying in any respect the Declaration."[1] Under instructions of April 3, 1857, Mr. Buchanan having become President, all negotiations on the subject were suspended for the purpose of examining the questions involved.[2] On reviving in 1861 negotiations for the accession of the United States to the Declaration, Mr. Seward, in circular instructions to our ministers in Europe, under date of April 24, declared that the President, whilst desirous of the amendment exempting private property at sea from capture, was persuaded that, under the then existing circumstances, it was wise to secure "the lesser good offered by the Paris Congress, without waiting indefinitely in hope to obtain the greater one."[3] Authority was accordingly given to sign conventions embodying the four rules. The negotiations, however, came to naught, for, the Southern States having declared their intention to grant letters of marque, it was apprehended by Great Britain and France that the acceptance by the United States of the provisions declaring privateering to be abolished might involve them in the question of the right of the United States to bind the revolting section.[4]

In his annual message to Congress, December 5, 1898, President McKinley, with an appreciation of the needless waste of war, declared it to be the desire of this nation to re-

[1] Mss. Dispatches, France, vol. xl; Wheaton, International Law (Lawrence's ed.), p. 640.

[2] Mss. Instructions, Great Britain, vol. xvii.

[3] Diplomatic Correspondence, 1861, p. 34. [4] Id. p. 146.

duce to the lowest possible point the damage sustained in time of war by peaceful trade and commerce. "This purpose," he said, "can probably best be accomplished by an international agreement to regard all private property at sea as exempt from capture or destruction by the forces of belligerent powers. The United States Government has for many years advocated this humane and beneficent principle, and is now in position to recommend it to other powers without the imputation of selfish motives. I therefore suggest for your consideration that the Executive be authorized to correspond with the governments of the principal maritime powers, with a view of incorporating into the permanent law of civilized nations the principle of the exemption of all private property at sea, not contraband of war, from capture or destruction by belligerent powers."[1] Prior to the date of this message, the Russian government had been informed of the cordial sympathy of the United States with the principle involved in the Czar's proposal of a general reduction of military establishments, and the readiness of the United States to take part in the proposed conference. In the Russian circular of January 11, 1899, capture at sea was not, it is true, among the enumerated topics; but in the invitation of the Netherlands government there were indicated as questions to be discussed at the proposed conference as well those mentioned in the Russian circular as all others, not affecting the political or conventional relations of the powers, "connected with the ideas" set forth in the Russian tentative invitation of August 24.[2] With the ideas of the heavy burden of armaments and the waste of war, the American government associated the capture and destruction of private property at sea. As brought to the attention of the conference, the American proposition declared that, with respect to the signatory parties, private property should be exempt from capture or seizure on the high seas or elsewhere by armed vessels or military forces,—contraband of war and vessels with their cargoes attempting to break a blockade, excepted. The wish to confine the deliberations of the conference to the Mouravieff programme prevailed;

[1] Foreign Relations, 1898, p. lxxxv.

[2] Parliamentary Papers, Mis. No. 1, (1899), pp. 3, 8, 27.

but the committee, to which the proposition was referred by the president of the conference, reporting July 5, through Professor de Martens, that it did not think that it was possible for it to enter into an examination of the question, expressed a wish that the proposition be placed in the programme of a future conference. To this disposition of the subject, the conference (the delegations of Great Britain and France, who, in the absence of instruction, were not prepared for the introduction of the subject, abstaining) agreed.[1] The present American Executive, in his annual message of December 7, 1903, and the last Congress, in a joint resolution approved April 28, 1904, have declared in favor of the incorporation of the principle of immunity into the permanent law of civilized nations.

Of foreign powers, Italy so early as 1865 made provision in her marine code for abolishing, on condition of reciprocity, capture and seizure of the merchant vessels of an enemy engaged in innocent commerce. Article XII of the treaty concluded February 26, 1871, with the United States, establishes as between the contracting parties the immunity of private property at sea. In the Russian regulations on maritime prizes confirmed by the Emperor March 27, 1895, the right to admit, on a basis of reciprocity, the exemption from confiscation of all or certain kinds of enemy vessels and cargoes is reserved. Austria, Prussia and Italy, in the war of 1866, exempted private property at sea from capture in decrees dated, respectively, May 13, May 19, and June 20.[2] Although in the war with Denmark two years earlier both Austria and Prussia, by their regulations of March 3 and 12, 1864, respectively, retaliatory of the Danish regulations of February 16, authorized the capture of enemy ships and cargoes, provision was made in the treaty of peace signed at Vienna October 30, 1864, for the mutual restitution of such captures.[3] In April 1868, the diet of the North German Confederation adopted, by a practically unanimous vote, a resolution inviting the federal chancellor

[1] Id. p. 164; Conférence Internationale de la Paix, pp. 43, 46; Holls, Peace Conference at The Hague, p. 311.

[2] British and Foreign State Papers, LVIII, 306, 310.

[3] Id. LIV, 525, 549, 552, 556.

to institute negotiations with a view to establish by conventions the freedom of private property at sea.[1] At the outbreak of the Franco-Prussian war, the Prussian government, by a decree of July 18, 1870, extended to French merchant vessels at sea the immunity from capture enjoyed by neutral vessels. Of the Prussian announcement, Mr. Fish, the American Secretary of State, said: "This gives reason to hope that the government and people of the United States may soon be gratified by seeing it universally recognized as another restraining and humanizing influence imposed by modern civilization upon the art of war."[2] France, with her superior navy, failed to forego the right of capture, and the Prussian decree was, near the close of the war, revoked. Said M. de Chaudordy, in defending the action of the French government, in his note of October 28, 1870, "The principles that the Prussian government advance and would have prevail may perhaps be more in accord, than the old customs, with the actual state of civilization, and it is possible that the progress of ideas may some day induce the powers to conclude conventions having for their object the moderation of the evils of war, as happened in 1856. France will be the first to join in such agreement; but, so long as these conventions have not been generally adopted, we are within our right in holding in our operations on the sea to customs established by the constant usage of all the maritime powers."[3] At the commencement of the Chino-Japanese war both belligerents declared a willingness reciprocally to exempt merchant ships from capture; but the negotiations with this in view, conducted through the American ministers at Peking and Tokio, came to naught, owing to the refusal of the Chinese government to withdraw a prior inconsistent decree.[4]

Great Britain, peculiarly maritime, has been averse to restrictions on belligerent activity at sea, and accordingly opposed to entrusting to international congresses, composed largely of delegates from continental powers, the formulation of rules of naval warfare. Only after assurances from

[1] Boeck, De la Propriété Privée Ennemie Sous Pavillon Ennemie, p. 127.

[2] Foreign Relations, 1870, pp. 216, 217. [3] Boeck, p. 137.

[4] Foreign Relations, 1894, pp. 169, 174.

the various powers invited to attend the Brussells Conference in 1874 that their delegates should not entertain directly or indirectly any proposition relating to maritime operations and naval warfare, did she decide to send a delegate.[1] Despite historic prejudice, there are not wanting, however, those who see advantages, under the rules of international maritime law as accepted at the present time, to a nation essentially commercial in the establishment of the freedom of private property at sea. Prior to the Crimean War, the right to seize the property of enemy subjects on board a neutral, as well as an enemy, vessel was claimed by Great Britain. France, on the other hand, had entered into numerous agreements establishing the rule of "free ships free goods," and had favored the doctrine that the liability to capture should be determined by the flag covering the cargo. The alliance of these two powers resulted in a provisional waiver by great Britain of the right of seizing enemy's property on board a neutral vessel contraband of war excepted.[2] The rule thus provisionally accepted was at the close of the war incorporated in the Declaration signed at Paris April 16, 1856, to which all the principal powers of the world, except the United States, Spain, Mexico and Venezuela, readily acceded. The failure of these four states was in no sense a repudiation of the second, third and fourth rules of that Declaration. Spain and Mexico, in communicating to the French government their refusals, expressed their willingness to approve the Declaration were it not for the provision abolishing privateering.[3] Venezuela declared an intention to accede only in case of the adoption of the proposed American amendment.[4] The United States, through the executive branch of the government, has sought the universal adoption of the rule that a neutral's flag covers enemy's goods. Both Spain and the United States acted on it in the war of 1898; and it may be observed that the latter power, in its instructions to diplomatic representatives abroad, April 22, 1898, referred to the second, third and fourth rules of the Declara-

[1] Supplement to London Gazette, Oct. 24, 1874.

[2] House Ex. Doc. 103, p. 2. 33d Cong. 1st Sess.

[3] British and Foreign State Papers, XLVIII, 133.

[4] Despatches, France, Mr. Mason to Mr. Marcy, Nov. 3, 1856.

tion of Paris as "recognized rules of international law."[1] Such then is the sanction of the principle that property of enemy subjects at sea, not contraband of war, is free from capture in neutral bottoms.

But why halt at this point? In a report to the House of Commons just four years after the signing of the Declaration of Paris, a select committee on merchant shipping said: "Your committee are aware that grave objections have been urged by high authorities against any further step in advance; but they cannot close this brief comment on so important a question without expressing a hope that Your Honourable House will agree with them in the opinion that, in the progress of civilization and in the cause of humanity, the time has arrived when all private property, not contraband of war, should be exempt from capture at sea. Your committee are of opinion that Great Britain is deeply interested in the adoption of this course."[2] The committee urged that in the event of hostilities involving Great Britain her carrying trade would, under the Declaration, inevitably be transferred to American and other neutral bottoms. Even a recent rumor of war in Europe in which there was a possibility that Great Britain might be involved had, it was observed, the effect of giving to neutral ships a decided preference in being selected to carry produce from distant parts to European ports. Proof of the effect on merchant shipping of a prolonged contest was immediately to be furnished in the American Civil War. For the year ending June 30, 1860, the value of imports into the United States carried in American vessels was $228,164,855, in foreign vessels $134,001,399; the value of exports in American vessels $279,082,902, in foreign vessels $121,039,394. Four years later the value of imports in American vessels had fallen to $81,212,077, while the value of imports in foreign vessels had risen to $248,350,818; the value of exports in American vessels had decreased to $102,849,409, while the value of exports in foreign vessels had increased to $237,442,730. In other words, in 1860 American vessels carried

[1] Moore, Naval War College, Situations with Solutions and Notes, (1901) p. 152.

[2] Parliamentary Papers 1860 XIII. (530), p. xiv.

in value 66½ per cent. of the imports and exports of the United States, while in 1864 they carried barely 27½ per cent. It is true that a large number of merchant vessels under American registry were either chartered or purchased by the Government for the use of the army and navy, yet, during the four years of the war, there were sold to foreigners, vessels aggregating 774,652 tons as compared with 671,377 tons during the preceding forty years—a period embracing our highest prosperity in ship-building (1855).[1] This was the result even though the naval predomination of the North over the South was never in doubt. In a speech in the House of Commons, August 5, 1867, J. Stuart Mill, logician and economist, said: "Suppose that we were at war with any power which is a party to the Declaration of Paris. If our cargoes would be safe in neutral bottoms but unsafe in our own, then, if the war was of any duration, our whole import and export trade would pass to the neutral flags; most of our merchant shipping would be thrown out of employment, and would be sold to neutral countries, as happened to so much of the shipping of the United States from the pressure of two or three, it might almost be said of a single cruiser."[2]

The British case has been succinctly stated by the eminent jurist, W. E. Hall, who, in his treatise on international law, contends most earnestly for the juristic right to capture private property at sea. In the "Contemporary Review" for October, 1875, he says: "We have more ships now than our adversaries would have, and we can add more rapidly to their number. But it does not matter. It is not merely a question of destroying the commerce of our enemies, it is one of protecting our own. Paucity or relative weakness of vessels is of far less importance for attack than for defense. The aggressor has choice of time, place, and object of attack; and the power of making this choice has become more valuable in proportion to the means which steam has given of striking rapid and unexpected blows. * * * Trade cannot be safe now, as it was seventy years ago, unless our cruisers swarm, as they swarmed then, in every water where our merchant flag is seen. * * * Commerce

[1] House Ex. Doc. No. 111, 41st Cong. 2nd Sess, p. 9.

[2] Hansard's Debates, vol. 189, p. 881.

is sensitive. English commerce is more sensitive, because more essential to the life of the people, than that of any other country; and uncertainty may injure it as fatally as actual loss. * * * With the exception of England, the great powers, taken as a whole, are countries which import commodities the use of which they can forego for a time, which raise for themselves the necessaries of life, and which, at a pinch, can obtain what they require by land transport. England alone draws from abroad raw material, on which most of its wealth and part of its subsistence depend; it alone, destitute of a land frontier, is a slave to the freedom of the seas. * * * Merchandize would be liable to capture, markets to panic and the distress which restricted production, consequent upon high prices, would impose upon the working classes, would be intensified by the dearness, and perhaps by a scarcity of provisions. In face of these facts, it may be permitted to doubt whether the belief that England has any interest in maintaining belligerent privilege at sea is not a mere superstition, and whether Mr. Cobden was not right in saying that 'Englishmen have, above all other people in the world, an interest in extending the Declaration of Paris so as to include the exemption of private property from capture by government vessels.' Shall we bring our wars to triumphant issues by depriving ourselves of bread, and our enemies of wine?" The learned writer adverting at a later date to his article in the "Contemporary Review," declared that the reasons there set forth for doubting the expediency of England's adhering to the right of capture had grown stronger with each successive year.[1].

The advocates of the principle of the inviolability of private property at sea, championed, it is true, a century and a half ago by Mably, are now numerous. A large proportion of the Italian and German jurists may be so classed,—including, says Bonfils, of Italian writers, Azuni, Fiore, Galiani, Lucchesi-Palli, Mancini, Paternostro, Pierantoni, Vidari; of German, Bluntschli, Bulmerincq, Veffcken, Gessner, Holtzendorf, de Neumann, and Perels.[2] The Institute of International Law in its sessions at The Hague in 1875, and Zurich in 1877, declared in favor of

[1] International Law (1895 ed.) p. 448.

[2] Manuel de Droit International Public, sec. 1300.

the principle. Likewise in its project on international prize regulations voted at Turin in September 1882, a clause was inserted declaring for the inviolability of private property at sea, on condition of reciprocity.[1]

In times not far remote, it was not unusual for a state (overlooking, it may be, an implied promise) to levy, in anticipation of war, an embargo on the merchant vessels then in port of a prospective enemy. Yet on the outbreak of the Crimean War a period of six weeks for loading and departing was allowed to Russian vessels by Great Britain and France. Russia reciprocated. In 1870 France allowed thirty days. In 1877 both belligerents gave days of grace, On the outbreak of the Spanish-American war the United States allowed a period of thirty days from the date of the existence of war; Spain limited the period to five days from the publication of the decree. By the Japanese imperial ordinance, issued February 9, 1904, Russian vessels in port might load or discharge their cargoes not later than February 16. Russia limited the period to forty-eight hours from the time of the publication of the notice by the local authorities. A full century has passed since the First Consul, at the commencement of a war with Great Britain, declared prisoners of war all British subjects within the limits of France. It is true a more recent instance of a partial retention after the outbreak of hostilities of enemy subjects can be found. So also the past half century has furnished two important cases of limited expulsion, a case of an attempted general confiscation of private property, and a case of an excessive levy by an invader of requisitions and contributions. Yet to enumerate with a knowledge of former custom these exceptional instances is to strengthen the belief that the certain tendency in the practice of nations has been to extend immunities to the person and property of the individual innocently engaged.

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[1] Annuaire for 1877, pp. 114, 138; for 1878, p. 152; and for 1882 pp. 185, 213.